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10 SHARP DEVELOPMENT COMPANY, INC. and  
SHARP LAFAYETTE, LLC

11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA  
13 SAN JOSE DIVISION

14  
15 In re,  
16 EXDS, INC. (f/k/a EXODUS  
17 COMMUNICATIONS, INC.),  
18 Debtor,

19 EXDS, INC. (f/k/a/ EXODUS  
20 COMMUNICATIONS, INC.),

21 Plaintiff,

22 v.

23 DEVCON CONSTRUCTION, INC.;  
24 SHARP DEVELOPMENT COMPANY,  
INC.; and SHARP LAFAYETTE, LLC,

25 Defendants.

26  
27 CASE NO. C 05-787 PVT

28 STIPULATION AND **[PROPOSED]**  
AMENDED PROTECTIVE ORDER;  
AND ADDENDUM  
THERETO *PV1*

29  
30 WHEREAS, on or about July 12, 2004, the Honorable Kent A. Jordan of the United  
31 States District Court for the District of Delaware approved the proposed "Protective Order Under

32 352\430543.2

33 AMENDED STIPULATED PROTECTIVE ORDER

1 Fed. R. Civ. P. 26(c)(7)" (hereinafter the "Stipulated Protective Order") submitted by plaintiff  
 2 EXDS, Inc. ("EXDS"), defendant Devcon Construction, Inc. ("Devcon"), and defendants Sharp  
 3 Development Company, Inc., and Sharp Lafayette, LLC (collectively "Sharp") (hereinafter  
 4 collectively the "Parties"), a true and correct copy of which is attached hereto as **Exhibit A**, to  
 5 the ~~Stipulation and [Proposed] Amended Protective Order~~ filed herein on  
**WHEREAS**, on or about May 18, 2005, the Parties appeared before the Honorable Chief  
 6 Magistrate Judge Patricia V. Trumbull by telephone regarding a dispute which arose during the  
 7 Rule 30(b)(6) deposition of Sharp;

8 **WHEREAS**, the Court issued a written order on May 18, 2005, stating that pending the  
 9 entry of a stipulated protective order governing the handling of any confidential information  
 10 produced in this action, any party may designate confidential information "Confidential –  
 11 Attorneys Eyes Only" during a deposition, which information shall only be disclosed to counsel  
 12 of record for the Parties unless and until either the designating party agrees in writing to remove  
 13 the designation, or the Court orders the information to be de-designated after a properly noticed  
 14 motion;

15 **WHEREAS**, the Court's May 18, 2005 order required that "no later than June 15, 2005,  
 16 the parties shall submit either a stipulated form of protective order, or else their respective  
 17 proposals for a protective order to govern the handling of confidential information produced  
 18 during this litigation;" and

19 **WHEREAS**, the Parties desire to amend the already existing Stipulated Protective Order  
 20 as set forth herein below (hereinafter this document shall be referred to as the "Amended  
 21 Protective Order").

22 NOW THEREFORE, the Parties, and each of them, by and through their respective  
 23 counsel, agree and stipulate as follows:

24 1. This Amended Protective Order shall govern the handling of documents during the  
 25 pretrial phase of this adversary proceeding. Unless otherwise agreed to in writing by the person  
 26 or entity that ~~designates material~~ <sup>PV1</sup> ~~produces or discloses~~ "Confidential Material" or "Confidential – Attorneys' Eyes  
 27 Only Material," as defined herein below, or until the Court orders otherwise, any Party, person, or  
 28 entity receiving "Confidential Material" or "Confidential – Attorneys' Eyes Only Material" shall

6/15/05;  
 PV1

1 use it only for purposes set forth herein and shall not disclose that information to anyone other  
2 than as permitted herein.

3       2.     “Confidential Material” as used herein means trade secrets or other proprietary or  
4 confidential research, development or commercial information entitled to confidential treatment  
5 pursuant to Fed. R. Civ. P. 26(c)(7). Use of Confidential Material during pretrial proceedings and  
6 discovery shall be governed by this Amended Protective Order.

7       3.     “Confidential – Attorneys Eyes Only Material” as used herein means extremely  
8 sensitive and private “Confidential Material” that warrants a higher degree of protection from  
9 ~~because the potential for injury from disclosure is substantial and cannot~~  
10 ~~disclosure than provided for Confidential Material, including but not limited to confidential~~  
~~be prevented through means less restrictive of a party’s access to~~  
~~financial, proprietary, or trade secret information.~~ 11

11       4.     A "Subject Party," for the purposes of this Order, means the following: EXDS, the  
12 EXDS Plan Administrator, the EXDS Plan Committee, Devcon, Sharp, Ernst & Young LLP  
13 ("E&Y"), and Commercial Property Services ("CPS"), and/or any person or entity that is a  
14 respondent to a subpoena properly issued in this proceeding.

15 5. Any document produced by one Subject Party to another Subject Party, whether  
16 pursuant to the Federal Rules of Civil Procedure, the Federal Rules of Bankruptcy Procedure,  
17 order of Court, or voluntarily, may at the time of production be designated by the producing  
18 party, or non-party, ~~or its attorney~~ <sup>to a party</sup> in this litigation  
19 Subject Party as Confidential Material or Confidential – Attorneys Eyes Only Material if the  
20 producing Subject Party in good faith believes that the document meets the definition of  
21 Confidential Material or Confidential – Attorneys Eyes Only Material above. ~~The Subject Party~~  
22 ~~entity~~ <sup>Any person or</sup> to whom such production is made shall have the right to challenge any such designation, with any  
23 such dispute to be resolved by the Court, and the producing party shall have the burden to  
24 establish that the document is properly designated as Confidential Material or Confidential –  
25 Attorneys Eyes Only Material and subject to this Amended Protective Order. Each page of each  
~~contains confidential information~~ <sup>that</sup> such designated document shall be clearly stamped with either of the following legends:

“DESIGNATED CONFIDENTIAL MATERIAL”

or

“CONFIDENTIAL – ATTORNEYS’ EYES ONLY MATERIAL”

Such legend need not be placed on the original document but may instead be placed upon the copies produced or exchanged. If so designated, and unless and until otherwise ordered by the Court, Confidential Material and Confidential – Attorneys Eyes Only Material shall be subject to the restrictions contained in Paragraphs 7 and 8 of this Amended Protective Order.

5       6. Any oral or transcribed testimony and/or evidence, or magnetic media containing  
6 portions of a deposition transcript (e.g., videotape or computer disk) of a Subject Party or its  
7 ~~current or former agents at any deposition~~ may be designated (orally on the record before, during  
8 or at the conclusion of such testimony, or in writing within fourteen (14) calendar days after  
9 receipt of the transcript) by ~~that Subject Party~~ as Confidential Material or Confidential –  
10 ~~Attorneys Eyes Only Material if that Subject Party in good faith believes that the testimony meets~~  
11 the definitions of Confidential Material or Confidential – Attorneys Eyes Only Material in this  
12 Amended Protective Order. Any ~~Subject Party~~ shall have the right to challenge any such  
13 designation made, with any such dispute to be resolved by the Court, and the party designating  
14 such testimony shall have the burden to demonstrate that the testimony is properly designated as  
15 Confidential Material or Confidential – Attorneys Eyes Only Material and subject to this  
16 Amended Protective Order. If such designations are made, the cover page of the original  
17 transcript and each copy thereof, and each page of the transcript containing the designated portion  
18 of the testimony, shall bear either of the following legends:

“DESIGNATED CONFIDENTIAL MATERIAL”

or

“CONFIDENTIAL – ATTORNEYS’ EYES ONLY MATERIAL”

22 If so designated, and unless and until otherwise ordered by the Court, such testimony and the  
23 substance thereof shall be subject to the restrictions contained in ~~Paragraphs 7 and 8 of this~~  
24 Amended Protective Order.

25        7. The Subject Parties shall not disclose documents or testimony designated as  
26 "Confidential Material" (or the contents or substance thereof) to anyone except (i) attorneys (and  
27 support staff thereof) of the Subject Parties; (ii) consulting and/or testifying experts retained by  
28 the Subject Parties; (iii) the officers, directors, and employees of the Subject Parties that were

1 directly involved in and have knowledge of the matters alleged in the Complaint filed by EXDS  
 2 to initiate this proceeding, and/or that are directly involved and participating in this litigation; (iv)  
 3 potential or actual witnesses; (v) any mediator or arbitrator engaged by the parties in this  
 4 adversary proceeding; (vi) the Court; and (vii) court reporters, videographers, and any other  
 5 persons involved in recording deposition or in-court testimony in this action (collectively, the  
 6 "Authorized Recipients").

*Nothing herein precludes disclosure of Confidential Material to the court and court personnel in the course of their duties.*

7 8. The Subject Parties shall not disclose documents or testimony designated as  
 9 Confidential – Attorneys Eyes Only Material (or the contents or substance thereof) to anyone  
 10 except to the persons identified in sections (i) [attorneys], (ii) [consulting and/or testifying  
 11 experts], (v) [mediators or arbitrators], (vi) [the Court], and (vii) [court reporters, videographers]  
 12 of Paragraph 7 above (collectively "Attorneys Eyes Only Recipients").

*Nothing herein precludes disclosure of Confidential Material to the court and court personnel in the course of their duties.*

13 9. If a Subject Party, Authorized Recipient, or Attorneys Eyes Only Recipient  
 14 (collectively "Receiving Parties") learns that, by inadvertence or otherwise, it has disclosed  
 15 Confidential Material or Confidential -- Attorneys Eyes Only Material to any person or in any  
 16 circumstance not authorized under this Amended Protective Order, the Receiving Party must  
 17 immediately (a) notify in writing the designating party of the unauthorized disclosures, (2) use its  
 18 best efforts to retrieve all copies of the Confidential Material or Confidential -- Attorneys Eyes  
 19 Only Material, and (c) inform the person or persons to whom unauthorized disclosures were made  
 of all the terms of this Order.

20 10. Any Authorized Recipient that receives Confidential Material and any Attorneys'  
 21 Eyes Only Recipient that receives Confidential – Attorneys' Eyes Only Material shall, in  
 22 advance, be advised of the existence and application of this Amended Protective Order, including  
 23 without limitation, its application to their employees and support staff, if they have any, and shall  
 24 agree to be bound thereby. Material designated as Confidential Material or Confidential –  
 25 Attorneys' Eyes Only Material and the contents thereof shall not be copied, compiled,  
 26 summarized or otherwise disclosed, orally or in writing, except by and for the sole use of  
 27 Authorized Recipients who receive Confidential Material and Attorneys' Eyes Only Recipients  
 28 who receive Confidential – Attorneys' Eyes Only Material. The Authorized Recipients and

1 Attorneys' Eyes Only Recipients shall be entitled to copy and use the documents designated as  
 2 Confidential Material or Confidential – Attorneys' Eyes Only Material, respectively, solely in  
 3 connection with the prosecution or defense of this adversary proceeding, provided, however, that  
 4 this Amended Protective Order does not in any way affect or govern the right of the parties to use  
 5 material designated as Confidential Material or Confidential – Attorneys' Eyes Only Material  
 6 pursuant to this Amended Protective Order in connection with the adversary proceeding styled  
 7 EXDS, Inc. v. Ernst & Young, LLP, Adv. No. 03-56183, currently pending in the United States  
 8 District Court for the District of Delaware, and/or any mediation/arbitration proceedings relating  
 9 to the matters therein (collectively, the "E&Y Arbitration"). The use of Confidential Material or  
 10 Confidential – Attorneys' Eyes Only Material in the E&Y Adversary Proceeding is a matter for  
 11 the Judge in that action to decide, and use of Confidential Material or Confidential – Attorneys'  
 12 Eyes Only Material in the E&Y Arbitration is a matter for the arbitration panel in the E&Y  
 13 Arbitration to decide.

14 11. Without written permission from the designating party or a court order secured  
 15 after appropriate notice to all interested persons, a party may not file in the public record in this  
 16 action any Confidential Material or Confidential – Attorneys Eyes Only Material. A party that  
 17 seeks to file under seal any Confidential Material or Confidential – Attorneys Eyes Only Material  
 18 must comply with Civil Local Rule 79-5. In the event that Confidential Material or Confidential  
 19 – Attorneys Eyes Only Material is used in any Court proceeding, it shall not lose its status  
 20 through such use, unless it is publicly disclosed. p/v1

21 12. Counsel for the respective Parties shall address in the pretrial order how they  
 22 propose to handle the use and disclosure of Confidential Material and Confidential – Attorneys  
 23 Eyes Only Material at trial.

24 13. Within ninety (90) days after this proceeding is finally concluded, including the  
 25 exhaustion of all possible appeals, any Subject Party, Authorized Recipient, or Attorneys' Eyes  
 26 Only Recipient that has received Confidential Material or Confidential – Attorneys Eyes Only  
 27 Material covered by this Amended Protective Order shall return or destroy all such material,  
 28 including all copies, notes, summaries, compilations, or other documents containing the substance

1 thereof, except the work product of attorneys and/or designated deposition transcripts in the  
2 possession of counsel to any Subject Party.

3 14. Any Subject Party, Authorized Recipient, or Attorneys Eyes Only Recipient who  
4 violates this Amended Protective Order shall be liable only for actual damages suffered, provided,  
5 however, that consent to entry of this Amended Protective Order shall not, in of itself, be  
6 construed as submission to personal jurisdiction in the Northern District of California in any civil  
7 action arising out of any alleged violation of this Amended Protective Order.

8 15. Other Proceedings. By entering this order and limiting the disclosure of  
9 information in this case, the Court does not intend to preclude another court from finding that  
10 information may be relevant and subject to disclosure in another case. Any person or party  
11 subject to this order who becomes subject to a motion to disclose another party's information  
12 designated as Confidential Material or Confidential – Attorneys Eyes Only Material pursuant to  
13 this order shall promptly notify that party of the motion so that the party may have an opportunity  
14 to appear and be heard on whether that information should be disclosed.

15 **IT IS HEREBY STIPULATED.**

16 Dated: June 15, 2005

HOPKINS & CARLEY  
A Law Corporation

18 By: \_\_\_\_\_ //s//

19 Tod C. Gurney  
20 Attorneys for Defendants SHARP  
21 DEVELOPMENT COMPANY, INC. and  
SHARP LAFAYETTE, LLC

22 Dated: June 15, 2005

KRIEG, KELLER, SLOAN, REILLEY &  
ROMAN LLP

24 By: \_\_\_\_\_ //s//

25 Kenneth E. Keller  
26 Attorneys for Plaintiff, EXDS, INC.

27 ***Signatures & Order on Next Page***

1 Dated: June 15, 2005

MILLER, MORTON, CAILLAT & NEVIS

2

3 By: \_\_\_\_\_ //s//  
4 Christopher Hersey, Esq.  
5 Attorneys for Defendant DEVCON  
6 CONSTRUCTION, INC

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9 **IT IS SO ORDERED:**

10 Dated: 7/25, 2005

11 *Patricia V. Trumbo*  
12 *Magistrate* JUDGE OF THE DISTRICT COURT

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2 **ADDENDUM TO PROTECTIVE ORDER**  
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*EXDS, Inc. v. Devcon Construction, Inc., et al.*

4 Case No. C05-0787 PVT  
5

6 IT IS HEREBY ORDERED as follows:  
7

8 **DESIGNATION OF DOCUMENTS**  
9

10 Before designating any specific information “Confidential” or “Confidential -- Attorneys  
11 Only,” the designating party’s counsel shall make a good faith determination that the information  
12 warrants that level of protection under Rule 26(c) of the Federal Rules of Civil Procedure.  
13

14 Counsel should note that not all confidential documents warrant the “Confidential -- Attorneys  
15 Only” level of protection. This heightened level of protection is appropriate only for the most  
16 highly sensitive information; it is warranted only if “the potential injury is substantial and cannot  
17 be prevented through the use of any device less restrictive of a party’s access to his lawyer.” *Doe  
v. Dist. of Columbia*, 697 F.2d 1115, 1120 (D.C. Cir. 1983). Thus, the court expects the parties  
18 to use this designation sparingly. *See, e.g., THK America v. NSK Co., Ltd.*, 157 F.R.D. 637 (N.D.  
19 Ill. 1993) (revoking party’s right to use “attorneys’ eyes only” designation as sanction for bad  
20 faith overuse of that designation).  
21

22 Counsel are cautioned that over-designation of documents may result in sanctions. The  
23 filing of documents designated “Confidential” or “Confidential -- Attorneys’ Eyes Only” puts an  
24 additional burden on the court. Often the party filing the document is not the designating party.  
25 In that situation the party does not have the option to unilaterally de-designate documents before  
26 submitting them to the court, and has no choice but to request they be filed under seal. Over-  
27 designating documents can thus result in unnecessary work for the court in sorting the documents  
28 that deserve sealing from those that do not, as well as additional work for the parties who must  
then re-file public versions of the non-confidential documents. The best way to avoid this result  
is for counsel to use best efforts to make appropriate designations at the outset, and to promptly  
de-designate a document when it comes to counsel’s attention that the document is over-

1 designated.

2 REQUESTS TO FILE DOCUMENTS UNDER SEAL

3 Any party wishing to file any document(s) designated "Confidential" or "Confidential --  
4 Attorneys' Eyes Only" shall lodge the document(s) along with a Request for Sealing pursuant to  
5 Civil Local Rule 79-5. The document(s) shall be submitted in an appropriate envelope labeled  
6 with the case name and number and the title of the document(s). Unless otherwise ordered by the  
7 Court, **WITHIN FIVE DAYS AFTER ANY REQUEST FOR SEALING IS FILED**, any  
8 party claiming confidentiality for the information for which sealing is requested shall serve and  
9 file declaration(s) from competent witnesses setting forth specific facts demonstrating that  
10 sealing is warranted under rule 26(c). The parties are cautioned that "Broad allegations of harm,  
11 however, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule  
12 26(c) test." *Beckman Indus., Inc. v. International Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992).  
13 Further, the factual showing must address separately each portion of the materials that the party  
14 contends warrants protection. *See* Civil Local Rule 79-5.

15 Dated: 1/25/05

  
16 PATRICIA V. TRUMBULL  
17 United States Magistrate Judge

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